Tsang & Ong Stockbrokers (Pte) Ltd v Joseph Ling Kuok Hua

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–168–OF 1996–III(II)
ZAKARIA SAM JC
24 NOVEMBER 2000

Civil Procedure *— Service — Service out of jurisdiction — Writ filed in Singapore — Service of writ by plaintiff's agent in Malaysia — Whether judgment obtained irregular — Rules of the High Court 1980 O 11 & O 65 r 2*

The defendant opened an account with the plaintiffs for the trading of securities in which the plaintiffs agreed to act for the defendant as a dealer for the purpose of buying and selling securities for the defendant. Later, the defendant failed to pay the plaintiff the sum of RM708,742.75. The writ of summons and statement of claim was filed in the Singapore High Court vide Suit No 1224 of 1996. After an order for service out of jurisdiction was obtained, the writ of summons and statement of claim were served on the defendant on 27 July 1996 by the plaintiffs' agent in Kuching. Judgment in default of appearance was obtained against the defendant on 20 August 1996 in Singapore ('the Singapore judgment'). The Singapore judgment was subsequently registered as judgment of the High Court in Sabah and Sarawak pursuant to an order dated 5 October 1996. It is the defendant's case that the Singapore judgment was irregularly obtained as the service of the plaintiffs' writ was not proper since the plaintiffs failed to comply with O 65 r 2 of the Rules of the High Court 1980 ('the RHC') and therefore the registration of the Singapore judgment in the High Court in Kuching is invalid and a nullity.

Held, dismissing the defendant's application:

(1) The plaintiffs had preferred the mode of service under O 11 rr 3(8) and 4(2)(c) over O 65 r 2 of Singapore Rules of Court ('the SCR') which is similar to O 65 r 2 of the RHC, by using the service of their local agent in Kuching. Order 11 r 4(2)(c) of SCR allows 'the service by a method of service authorized by the law of that country for service of any originating process issued by that country'. Service by a local agent (other than by court process server) is a recognized mode of service by the courts in Malaysia. Therefore the service of the Singapore judgment is good in law (see p 262F–G).

(2) It is also not the function of the court to consider the validity of the Singapore judgment. If the defendant is not satisfied with the judgment, he should go back to the Singapore High Court to challenge the validity of the judgment and the order for registration of the judgment will be revoked accordingly if the defendant succeeds. Unless this is done, a judgment or decree

pronounced by the court of a foreign country will be treated and acted upon here as final, notwithstanding any irregularity of procedure under the local law, provided the foreign court had jurisdiction over the subject matter and the person brought befire it, and the proceedings do not offend against natural justice (see pp 262H–263A); *Anthinarayana Mudaliar v Ajit Singh* [1953] MLJ 229 followed.

[**Bahasa Malaysia summary**

Defendan telah membuka satu akaun dengan plaintif-plaintif untuk dagangan sekuriti di mana plaintif-plaintif telah bersetuju untuk bertindak bagi pihak defendan sebagai pengedar bagi tujuan membeli dan menjual sekuriti untuk defendan. Berikutan itu, defendan telah gagal untuk membayar kepada plaintif sejumlah RM708,742.75. Writ saman dan pernyataan tuntutan telah difailkan di Mahkamah Tinggi Singapura melalui Guaman No 1224 tahun 1996. Setelah satu perintah untuk penyampaian di luar bidang kuasa telah diperoleh, writ saman dan pernyataan tuntutan telah disampaikan ke atas defendan pada 27 Julai 1996 oleh ejen plaintif-plaintif di Kuching. Penghakiman ingkar kehadiran telah diperolehi terhadap defendan pada 20 Ogos 1996 di Singapura ('penghakiman Singapura tersebut'). Penghakiman Singapura tersebut telah berikutnya didaftarkan sebagai penghakiman Mahkamah Tinggi di Sabah dan Sarawak menurut satu perintah bertarikh 5 Oktober 1996. Adalah kes defendan bahawa penghakiman Singapura tersebut telah diperolehi secara luar aturan kerana penyampaian writ plaintif-plaintif adalah tidak betul memandangkan plaintif-plaintif telah gagal untuk memenuhi A 65 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan oleh demikian pendaftaran penghakiman Singapura tersebut di Mahkamah Tinggi Di Kuching adalah tidak sah dan terbatal.

Diputuskan, menolak permohonan defendan:

(1) Plaintif-plaintif lebih memilih kepada cara penyampaian di bawah A 11 kk 3(8) dan 4(2)(c) daripada A 65 r 2 Kaedah-Kaedah Mahakmah Sinagpura ('KMS'), yang serupa dengan A 65 k 2 KMT, dengan menggunakan penyampaian ejen tempatan mereka di Kuching. Aturan 11 k 4(2)(c) KMS membenarkan 'penyampaian melalui satu cara yang dibenarkan oleh undang-undang negara tersebut untuk penyampaian apa-apa proses pemula yang dikeluarkan oleh negara tersebut'. Penyampaian oleh ejen tempatan (selain daripada penyampai proses mahkamah) adalah cara penyampaian yang diiktiraf oleh mahkamah-mahkamah di Malaysia. Oleh itu penyampaian penghakiman Singapura tersebut adalah betul di sisi undang-undang (lihat ms 262F–G).

(2) Ia juga bukan fungsi mahkamah untuk mempertimbangkan kesahihan penghakiman Singapura tersebut. Jika defendan tidak berpuas hati dengan penghakiman tersebut, beliau sepatutnya kembali ke Mahkamah Tinggi Singapura untul mencabar kesahihan penghakiamn tersebut dan perintah pendaftaran penghakiman tersebut akan dibatalkan sewajarnya jika defendan berjaya. Kecuali ini dilakukan, satu penghakiman atau keputusan yang diumumkan oleh mahkamah negara asing akan dianggap dan dilaksanakan di sini sebagai muktamad, walaupun terdapat apa-apa luar aturan prosedur di bawah undang-undang tempatan, dengan syarat mahkamah asing tersebut mempunyai bidang kuasa ke atas perkara pokok tersebut dan orang yang dihadapkan, dan prosiding tersebut tidak melanggar keadilan asasi; lihat ms 262H–263A); *Anthinarayana Mudaliar v Ajit Singh* [1953] MLJ 229 diikut.

Notes

For cases on service out of jurisdiction, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4102–4126.

Cases referred to

Anthinarayana Mudaliar v Ajit Singh [1953] MLJ 229 (folld)
Fortune Hong Kong Trading Ltd v Cosco Feoso (Singapore) Pte Ltd [2000] 2 SLR 717 (refd)
Sunkyong International Inc v Malaysian Rubber Development Corp Bhd [1992] 2 MLJ 146 (refd)
United Overseas Bank Ltd v Wong Hai Ong [1999] 1 MLJ 494

Legislation referred to

Rules of the High Court 1980 O 11 rr 2, 6(2), O 65 r 2, O 67 rr 2, 7(3)
Supreme Court Rules O 11 r 4(2), O 65 r 2 [Sing]

Lim Lip Sze (*Reddi & Co*) for the plaintiffs.
Ernest Chua (*Ernest Chua & Co*) for the defendant.

Zakaria Sam JC

Background

The plaintiffs are stockbrokers and members of the Stock Exchange of Singapore Ltd.

By an agreement ('the Account Agreement') made on 15 January 1996 between the plaintiffs and the defendant, the defendant opened an account with the plaintiffs for the trading of securities in which the plaintiffs agreed to act for the defendant as a dealer for the purpose of buying and selling securities for the defendant.

A On 14 February 1996, the plaintiffs purchased securities on the defendant's behalf, and on or before the due date, the defendant instructed the plaintiffs to sell the said securities on a contra basis and the defendant failed to make payment on the due date. As a result, the plaintiffs exercised their right to and were forced to sell the said securities under Bye Law II cl 4.7 of the Bye Laws of the Stock Exchange of Singapore Ltd. The said B securities were sold at a loss. Consequently in breach of the Account Agreement, the defendant failed to pay the sum RM708,742.75 indebted to the plaintiffs.

The writ of summons and statement of claim was filed in the Singapore High Court vide Suit No 1224 of 1996 on 5 July 1996. The plaintiffs C obtained an order in Singapore for service out of jurisdiction on 3 July 1996. The writ of summons and statement of claim were served on the defendant on 27 July 1996 by the plaintiffs' agent in Kuching, Messrs Reddi & Co.

When the defendant failed to enter appearance within the period of 21 days, Judgment in default of appearance was obtained against the defendant on 20 August 1996 in Singapore ('the Singapore judgment'). D The Singapore judgment was subsequently registered as judgment of the High Court in Sabah and Sarawak pursuant to an order dated 5 October 1996. The order was served on the defendant on 25 November 1996.

The notice of the registration of the Singapore judgment was served on the defendant on 11 November 1996.

E The defendant did not file any application to set aside the said notice within the period of ten days as prescribed for in the notice pursuant to O 67 r 7(3) of the Rules of the High Court 1980 ('the RHC').

The plaintiffs, thereafter, commenced bankruptcy proceedings against the defendant but was later withdrawn when the defendant agreed to settle the claim by way of monthly instalments.

F When the defendant defaulted with his payment, a second bankruptcy proceedings was recommenced.

The defendant thereafter filed this application (encl 20) to set aside the order of registration of the Singapore judgment on the grounds:

G (1) that the plaintiffs has failed to comply with O 65 r 2 of the RHC in the writ of summons in Singapore High Court Suit No 1224 was not duly served on the defendant;

(2) that at all material times the defendant/judgment debtor did not appear before the Singapore High Court either by himself or through his advocate; and

H (3) that the registration of the Singapore judgment on 5 October 1996 is invalid and a nullity and that the enforcement of the said judgment would be contrary to public policy.

Preliminary objection

I At the outset of the hearing the learned counsel for defendant raised objection to the inclusion of the affidavit in reply by one Goh Chui Li (encl 52) as it was filed out of time.

After a short argument the plaintiff withdrew encl 52.

The counsel for the defendant then submitted that in the absence of encl 52 all the assertions by the defendant as averred by him in his affidavit in reply (encl 46) are deemed admitted by the defendant.

With due respect I do not agree. I find the affidavit in opposition (encl 23) by one Tan Boon Hai, the General Manager of the plaintiff is sufficient to oppose the defendant's application (encl 20). Furthermore, encl 52 mostly cover point of law and not fact.

Upon the withdrawal of encl 52 by the plaintiff, the defendant requested for costs of the preliminary objection but I am making no order as to costs.

The issue

The first issue is whether the writ of summons in the Singapore High Court No 1224 of 1996 was duly served on the defendant.

It is the defendant's case that the Singapore judgment was irregularly obtained as the service of the plaintiffs' writ was not proper and therefore the registration of the said Singapore judgment in the High Court in Kuching is invalid and a nullity.

It is the defendant's contention that the service by an agent is bad in law as it is contrary to O 65 r 2 of the RHC. The defendant is relying on the case of *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 494 which ruled that the service of a foreign legal process through a private agent in Malaysia is not valid. The learned judge in that case referred to the Supreme Court decision of *Sunkyong International Inc v Malaysian Rubber Development Corp Bhd* [1992] 2 MLJ 146, concluded that:

> I am of the view that foreign countries should hearken to the decision in *Sunkyong International Inc v Malaysian Rubber Development Corp Bhd* and should not make valid any method of service of legal process that *Sunkyong International Inc v Malaysian Rubber Development Corp* had ruled invalid.

He further ruled that:

> In my view there is absolutely no reason why service of legal process of Singapore or Brunei Darussalam cannot and should not be done through the special provision of the Singapore O 11 r 3(8) which is by our judicial officer and that, in my view, is the only permissible method of service other than the method under O 65. The fact that service by an agent is not expressly prohibited does not mean that the Singapore O 11 r 3(8) need not be complied with. That provision and O 65 are enacted for observance and to be ignored, and, implicitly, all other methods or service will not be allowed since it amounts to the exercise of the jurisdiction of the Singapore Courts in Malaysia. Therefore, in my respectful view, the said opinion expressed in this regard by Malaysian High Court Practice (Vol 1, 1998 Ed) at pp 4424–4454 is not correct. Insofar as the Singapore O 11 r 3(8)(a) is concerned, it cannot be read as allowing the service of the writ in Malaysia by a private agent as that is only allowed in Malaysia in respect of processes originating in Malaysia and not to foreign process.

Reading through *Sunkyong*'s case, I could not find any ruling laid down by the Supreme Court that the foreign service of legal process in Malaysia could not be effected by a local agent.

In *Sunkyong*'s case a local defendant filed a summons in chamber and was heard ex-parte before the learned registrar, where the local defendant obtained an order, inter alia:

(i) that the local defendant be at liberty to issue a third party notice against the foreign defendant (a company incorporated in the USA, therefore a resident out of jurisdiction); and

(ii) that the local defendant be at liberty to serve the said third party a notice on the foreign defendant at a specific address in New York, USA through the agents of the local defendant there.

It was held by the Supreme Court that:

> It was common ground and we accepted that in the USA, there did not subsist the Civil Procedure Convention, therefore O 11 r 6(2) applied. The service of the notice of writ herein would have to be effected through the Government of the USA or through our Malaysian consular authority contrary to what was ordered and done in this case, as stated above.
>
> The rationale behind this prescribed method of service is of course that our courts do not exercise their judicial powers beyond their territorial limits, and further service of judicial process in a foreign country, to use the grave words of Lord Denning in *Afro Continental Nigeria Ltd v The Meridian Shipping Co SA* is an exercise of sovereignty in that country, which can only be done with the consent of that country.

The interpretation of the Supreme Court in the abovesaid case was confined to O 11 r 6(2) of the RHC. Therefore the provision of O 11 r 2 of the RHC must be strictly adhered to.

Sunkyong's case was referred to in *Fortune Hong Kong Trading Ltd v Cosco Feoso (Singapore) Pte Ltd* [2000] 2 SLR 717 where the Singapore Court of Appeal made this observation:

> The first thing to note is that both *Sunkyong* and Chow involve the interpretation of the respective provisions governing the service of process out of jurisdiction and they do not concern the interpretation of O 65 or its Malaysian equivalent. It appears to us that the primary concern of the judges in these cases was that the procedure set out in O 11 prescribing the methods of service of process in a foreign jurisdiction must be strictly adhered to. Understandably, they were sensitive to the possibility that the foreign state might view such a service of process as being an encroachment upon its sovereign rights.

The Singapore Court of Appeal in that case also discussed O 65 r 2 of the Supreme Court Rules ('the SCR') (which is similar to our O 65 r 2 of the RHC) where they held that:

> Giving O 65 r 2 its plain and ordinary meaning, the rule applied only where a letter of request for service from a foreign court or tribunal was received by the Minister for Law and was subsequently sent by him to the Supreme Court with an intimation that it was desirable that effect should be given to the

> request. In cases where no such letter of request was received, r 2 simply had no application. Order 65 r 2 was not intended to govern the service of all foreign processes in Singapore issued by the courts or tribunals of non-convention countries.

The Singapore Court of Appeal also touched on the application of O 11 r 4(2) of the SCR (which is similar to our O 11 r 6(2) of the RHC) except that our provision do not have r 6(3)) where it was held that:

> Order 11 r 4(2) was another strong indication that Singapore did not regard the service of process in a foreign jurisdiction as an encroachment upon the sovereignty rights of that country so long as it was served in accordance with any method of service authorized by its local laws for service of its originating process. If Singapore did not insist on service out of jurisdiction through official channels, it could not have been the intention of O 65 r 2 that service of all foreign process in Singapore must be effected through the official means as provided in that rule.

The restrictive nature of our O 11 r 6(2) of the RHC is acknowledged by the Supreme Court in *Sunkyong*'s case where they made this observation:

> It is possible that the Civil Procedure Convention if held or signed in future could contain methods of service less demanding on our foreign missions that as set out in O 11 r 6(2), eg even by the method of service as ordered by the learned registrar and upheld by the learned judge, with out present world having shrunk in these days and times and boundaries of nations consequently having been regarded with a more realistic pitch of fever.

It is interesting to note that the abovesaid observation has turned into reality by the amendment to O 11 r 2 of the RHC which introduced 'the service by the plaintiff or his agent whenever authorized by the law of that country' vide PU(A) 342/2000 effectively from 22 September 2000.

In the application before me today the plaintiffs prefer the mode of service under O 11 rr 3(8) and 4(2)(c) of the RHC over O 65 r 2 of the SCR to serve their Singapore judgment by using the service of their local agent in Kuching.

Order 11 r 4(2)(c) of the SCR allows 'the service by a method of service authorized by the law of that country for service of any originating process issued by that country.

Service by a local agent (other than by court process server) is a recognized mode of service by our court here. Therefore, the service of the Singapore judgment is good in law. Hence the said judgment is duly served on the defendant.

It is also not the function or duty of this court to consider the validity of the Singapore judgment. If the defendant is not happy with it he should go back to Singapore High Court to challenge the validity of the said judgment. In the event he succeeded there the order of registration of the said judgment would be revoked accordingly. It is pertinent to note that the defendant had not to date done anything about this.

Unless that is done, 'A judgment or decree pronounced by the court of a foreign country will be treated and acted upon here as final,

notwithstanding any irregularity of procedure under the local law, provided the foreign court had jurisdiction over the subject matter and the person brought before it, and the proceedings do not offend against natural justice'. (See *Anthinarayana Mudaliar v Ajit Singh* [1953] MLJ 229.)

The plaintiffs also raise the issue of estoppel whereby they contended that:

(i) the defendant did not apply to set aside the registration of the judgment when he has every opportunity to do so;

(ii) when the first bankruptcy proceeding was filed against him, the defendant did not file any application to set aside the order of registration of the judgment; and

(iii) when the said bankruptcy proceeding was filed the defendant had proposed settlement and had in fact made some payment towards the amount outstanding.

As such, the defendant is now estopped from proceeding herein to set aside the order.

Again I wish to stress here that the issue of estoppel is not the concern of this court. These issues should be tackled at source, that is the Singapore High Court.

I hereby dismiss the defendant's application (encl 20) with costs to the plaintiffs to be taxed unless agreed.

Application dismissed.

Reported by Benjamin Yong